PATAU RUBIS

v.

PATRICK UREN & ANOR.

HIGH COURT BORNEO, KUCHING
CHARLES NC HO J
[ELECTION PETITION NO. KG. 1 OF 1982]
29 AUGUST 1983

ELECTION: *General elections - Petition for declaration election of first respondent null and void*

CIVIL PROCEDURE: *Application to amend - Application to strike out petition - Jurisdiction of Court - same subscriber to more than one nomination paper - Objection - Failure of returning officer to give reasons for rejection of objection - Right to a recount - Non-disclosure of certain facts in petition - Whether fatal.*

The petitioner filed the petition seeking an order of the Court to declare the election of the 1st respondent in the general elections of 1982 void and for an order that a scrutiny be made under s. 35(d) of the Election Offences Act 1954 (the Act) for non-compliance with that Act and the Elections (Conduct of Elections) Regulations 1981 (the Regulations). The 2nd respondent was the returning officer. The 1st respondent applied to have the petition dismissed or struck out. The petitioner applied to have the petition amended.

Held:

[1] There was no need for the application for amendment to be dealt with at any length. If the 1st respondent failed in his application the amendments ought to be allowed. If he succeeded that would put an end to the whole matter.

[2] The Court has inherent power to dismiss or strike out petitions which are defective. The right conferred by the Act is a special kind of right unknown to the common law or equity, and the Court which administers it possesses a special kind of jurisdiction. It is not a civil right but a creature of statute and must be subject to the limitations imposed by the statute. (*Devan Nair v. Yong Kuan Teik* [1967] 1 MLJ 261; *Tengku Korish v. Mohamed bin Jusoh* [1970] 1 MLJ 7).

[3] The grounds 3 (b) and 3 (c) of the petition should be struck out. The questions raised were merely questions of law and could be dealt with by the Court immediately. Regarding ground 3 (b), in the absence of any provision which prevents an elector from subscribing more than one nomination paper, it could not be said that the returning officer was wrong in not rejecting the nomination paper subscribed on the ground that the same person had subscribed more than one nomination paper at the same election. Rule 4(d) of the Election Petition Rules 1954 ("the Rules") is not capable of being interpreted in the manner suggested. Similarly, nothing can result from ground 3(c). Failure on the part of the returning officer to comply fully with reg. 7(4) of the Regulations, that is to give reasons for his rejection of any objection lodged with him, does not of itself entitle the petitioner to any reliefs provided under s. 32 of the Act.

[4] Paragraph 3 (a) of the petition did not disclose any cause of action and ought to be struck out. A candidate is entitled to apply for a recount in the events mentioned in the provisos (a) and (b) to regulation 25 (13) of the Regulations but paragraph 3 (a) is silent as to whether any of those circumstances existed and as to whether the petitioner had made or

attempted to make any application for a recount. These are material facts which must be stated though briefly. Rule 4(1)(b) of the Rules is mandatory. Failure to comply with the mandatory provisions of the Act or Rules renders the petition defective. (*Samant N. Balakrishnan v. George Fernandes & Ors.* [1969] AIR Vol 56 SC 1212; Devan Nair *(supra)*).

[Petition dismissed.]

Cases referred to:
Devan Nair v. Yong Kuan Teik [1967] 1 MLJ 261
Tengku Korish v. Mohamed bin Jusoh [1970] 1 MLJ 7
Ponnusamy v. Returning Officer 1 ELR 133
Chong Thian Vun v. Watson & Anor. [1968] 1 MLJ 65
Muip bin Tabib v. Dato James Wong [1971] 1 MLJ 246
Zulkaranaini bin Mohd. Noor v. Syed Omar bin Mohd. & Anor. [1979] 2 MLJ 143
Samant N. Balakrishnan v. George Fernandes & Ors. [1969] AIR Vol 56 SC 1212
Hardwari Lal v. Kanwal Singh [1972] AIR Vol 59 SC 520
Keshav Prasad v. A.D.Mani [1961] DEC 133 (MPHC)
H.V. Kamath v. Election Tribunal [1958] AIR MP 168
James v. Smith [1890] 1 QB 384
Onkar Nath v. Ram Sarup Varma [1972] 44 ELR 214

Legislation referred to:
Elections (Conduct of Elections) Regulations 1981, reg. 4(4)(d), 7(4), 25(13)
Election Offences Act 1954, ss. 32(b), 35(d), 42
Election Petition Rules 1954, rr. 4(1) (a), (b), (d), 4(4)
Representation of the People Act 1951 [Ind], s. 83

JUDGMENT

Charles NC Ho J:

This petition arose out of the general election held in April 1982. The petitioner, Patau Anak Rubis alias Dr. Patau Rubis, the 1st respondent and three others were candidates for the parliamentary constituency of P. 131 Mas Gading. The 2nd respondent was the returning officer. The 1st respondent was returned as being duly elected by the 2nd respondent on 27 April 1982.

The petitioner filed this petition on 14 June 1982, seeking an order of the Court to declare the election of the 1st respondent void and further or in the alternative for an order that a scrutiny be made under s. 35(d) of the Election Offences Act 1954, on the ground that the election was not conducted in accordance with the Election Offences Act 1954, and or the Elections (Conduct of Elections) Regulations 1981, and that there were non-compliance (all by the 2nd respondent) of the said Act and Regulations which affected the results of the said election. There is no allegation of corrupt practices in the petition.

On 10 July 1982, the 1st respondent applied by way of notice of motion to have the petition dismissed/struck out on the following grounds:-

(1) The petition does not satisfy the mandatory requirements of s. 32 of the Election Offences Act 1954 and r. 4(1)(b) & (4) of the rules contained in the Second Schedule thereto, namely, the Election Petition Rules 1954;

(2) Matters complained of in paragraph 3(b) of the petition do not disclose non-compliance with the provisions of any written law relating to any election, and/or, there is no rule of law to the effect that a person shall not subscribe more than one nomination paper at the same election;

(3) Regulation 7 (4) referred to in paragraph 3 (c) of the petition does not require the returning officer to **furnish** grounds for his refusal to reject the nomination papers, but merely to 'inform the candidate concerned or his proposer or his seconder named in the nomination paper ..... the grounds thereof.

An application to amend the petition was made by the petitioner subsequent to the notice of motion filed by the 1st respondent. The proposed amendments are being opposed by the 1st respondent. Counsel for the petitioner says that the amendments are merely to clarify and not to add in more grounds and should therefore be allowed. It seems to me the proposed amendments are intended to make matters clearer. After hearing the submissions of Counsel on both sides in respect of this application and in respect of the notice of motion I do not think there is any need for me to deal with the application for amendment at any length. It is sufficient, I think, for me to say that if the 1st respondent fails in his application to dismiss or to strike out the petition then the amendments ought to be allowed. If he succeeds that would put an end to the whole matter.

Jurisdiction of The Court

The jurisdiction of the Court to hear election petitions is a creature of statute not only in this country but also in countries like India and England. Judges who heard election petitions had described this jurisdiction as a special jurisdiction or a peculiar jurisdiction. In exercising this special jurisdiction the Court has the inherent power to dismiss or strike out petitions which are defective (See *Devan Nair v. Yong Kuan Teik* [1967] 1 MLJ 261). Election petitions were considered to be defective where there was non-compliance with the mandatory requirements of the Election Offences Act and the Election Petition Rules in the drafting and presentation of petitions. Election Judges in this country, however, seem to have different views as to the mandatory nature of of the provisions in the Act and Rules. Perhaps if the Act provides for an appeal or a reference in respect of interlocutory decisions to the Federal Court a lot of these inconsistencies may be resolved. Judges however, seem to agree that the statutory requirements of election law must be strictly observed. Touching on the jurisdiction of the Court and the right to petition his Lordship Raja Azlan Shah J (as he then was) in the case of *Tengku Korish v. Mohamed bin Jusoh* [1970] 1 MLJ at p. 7 said:

> What 'right' does the Election Offences Act 1954 confer using the word 'right' in its broad sense? In my judgment the right conferred by that Act is a special kind of right unknown to the Common Law or equity, and the Court which administers it possesses a special kind of jurisdiction (see *Theberge v. Laudry (4), Goonesinha v. Hon. C.I. de Kretsor (5)* or what is said in *Arzu* (6) as a peculiar jurisdiction). It is not a civil right but a creature of statute or special law and must be subject to the limitations imposed by it (see *Ponnuswami v. Returning Officer, NammaKal Constituency & Ors. (7)*

Paragraphs (3) (b) & 3 (c) of The Petition

Paragraph 3 (b) of the petition reads:

> in breach of reg. 4(4)(d) of the Regulations the 2nd respondent refused to reject the nomination papers of the 1st Respondent and Abang Saufi on the grounds that the said nomination papers of each of them were subscribed to by Tomen ak. Konnek.

Unlike in England and India there is no provision in our written law to prohibit an elector from subscribing more than one nomination paper at the same election or to say what legal consequences will result if an elector in fact subscribed more than one nomination paper. In England there is a provision in the Parliamentary Election Rules which provides that no person shall subscribe more than one nomination paper at the same election and if he does his

signature shall be inoperative on any paper other than the one first delivered. It is argued by the petitioner to the effect that since an elector has only one vote and only one Member of Parliment can be returned in respect of each constituency and the principle is clearly that a candidate who is nominated by at least 6 electors must have at least this number of votes, by implication an elector can only subscribe one nomination paper. He urges the Court to adopt a purposive interpretation. We have provisions in our law to govern the right to vote, the manner a person can be nominated as a candidate and so on. The Supreme Court of India in *Ponnuswamy v. Returning Officer* 1 ELR 133 SC said :

> Election and all rights and liabilities relating to it are the creatures of statutory law. So is an election petition by which an election can be questioned and also all provisions relating to presentation, trial and decision of the election petition.

In the absence of any provision which prevents an elector to subscribe more than one nomination paper I cannot see how it can be said that the returning officer was wrong in not rejecting the nomination paper in question or was in breach of any provision of the law in not doing so. I do not think, with respect, that the reg. 4(4)(d) is capable of being interpreted in the manner suggested by Counsel. To do so would be to fill in the gaps left by the legislature.

Ground 3 (c) is related to ground 3 (b). It is clear from the wordings of reg. 7 (4) the returning officer must, in the event of an objection being made by any of the persons entitled to lodge such an objection and within the time specified, make a decision without much delay and inform the parties concerned of his decision and the grounds thereof. Assuming in the present case the returning officer had failed to give his grounds as he would appear to be required to do, this alone would not entitle the petitioner to any of the reliefs provided under s. 32 of the Act. To succeed the petitioner would still have to prove that the nomination paper in question was defective and ought to have been rejected and the failure to reject has affected the result of the election. In view of what I have said earlier in ground 3 (b) nothing can result from ground 3 (c).

It is submitted by Counsel for the petitioner that grounds (3)(b) and 3(c) should not be struck out or dismissed summarily. They should be dealt with at and after the trial. With respect I think Counsel on both sides have said what is there to say in respect of these grounds. The questions raised are purely questions of law and I cannot see why we cannot deal with it now. For reasons given above I am of the opinion that grounds 3(b) and 3(c) should be struck out.

Paragraph 3(a)

This paragraph reads:

> in breach of proviso (b) to reg. 25 (13) of the Regulations the 2nd respondent failed, neglected or refused to allow the petitioner an opportunity to apply for a recount of the vote before he (the 2nd respondent) declared the result of the said election or alternatively, that in breach of the said proviso, the 2nd respondent failed, neglected or refused to cause a recount to be made;

If the petitioner succeeds on this ground of petition the relief he is entitled will be an order for general scrutiny and recount under s. 35 (d) of the Act.

It is contended by Mr. Thomas, Counsel for the 1st Respondent, that this ground should be dismissed/struck out because it does not satisfy the mandatory requirements of s. 32 of the Election Offences Act 1954 and r. 4(1)(b) & (4) of the Election Petition Rules 1954. Counsel says that the provisions of the Act and the Rules must strictly be adhered to and failure to

comply with any of the mandatory provisions would render the petition defective. In support of this proposition Counsel referred to the cases of *Tengku Korish v. Mohd. bin Jusoh & Anor.* [1970] 1 MLJ at p. 7; *Devan Nair v. Yong Kuan Teik* [1967] 1 MLJ 261; *Chong Thian Vun v. Watson & Anor.* [1968] 1 MLJ 65; *Muip bin Tabib v. Dato James Wong* [1971] 1 MLJ 246 and *Zulkaranaini bin Mohd. Noor v. Syed Omar bin Mohd. & Anor* [1979] 2 MLJ 143, Counsel also referred to the case of *Wilfred Nissom v. Datuk Stephen Yong* (unreported) a case heard by me and to that part of the judgment where I said:

> In *Norbert Chong Kai Chong*; and *Ahmad Subki bin Haji Abd. Latif v. Mohd. Idris bin Haji Ibrahim & Lau Lee Ching* (unreported) it was held that failure to state the ground i.e. the section of the Ordinance relied on is fatal to an election petition.

In that case I did not strike out those grounds mentioned in that petition because of the decision in *Norbert Chong's* case. I thought I made it sufficiently clear in the few sentences before that, that those grounds were considered defective because the provisions of the regulations not complied with had not been mentioned and from the facts contained in the petition which of the grounds mentioned in s. 32 was relied upon by the petitioner.

Rule 4 (1) of the Election Petition Rules 1954, reads:

> 4 (1) An election petition shall contain the following statements:
>
> (a) it shall state the right of the petitioner within s. 34 of the Act; and
>
> (b) it shall state the holding and result of the election and shall briefly state the facts and grounds relied on to sustain the prayer

It is submitted by Mr. Thomas that this rule is mandatory because the word 'shall' has been used four times in it. He says that this rule is similar to s. 83 of the (Indian) Representation of the People Act 1951 and cited a number of Indian Supreme Court decisions which held that s. 83 is mandatory.

Section 83 reads:

> 83. Contents of petition:
>
> (1) shall contain a concise statement of material facts on which the petitioner relies.

In *Samant N. Balakrishnan v. George Fernandes & Ors.* [1969] AIR Vol 56 SC at p. 1212 his Lordship Hidayatullah CJ said:

> The section is mandatory and requires first a concise statement of material facts and then requires the fullest possible particulars. What is the difference between material facts and particulars. The word material shows that the facts necessary to formulate a complete cause of action must be stated. Omission of a single material fact leads to an incomplete cause of action and the statement of claim becomes bad.

In *Hardwari Lal v. Kanwal Singh* [1972] AIR Vol 59 SC at page 520 Ray J Said:

> Material facts are facts which if established would give the petitioner the relief asked for. If the respondent had not appeared could the Court have given a verdict in favour of the election petitioner. The answer is in the negative because the allegations in the petition did not disclose any cause of action.

The Courts in India also explained in other cases the words "material facts" to mean what is necessary for the purpose of formulating a complete cause of action and the failure to plead which would render the pleading to be struck out under the rules of pleadings. (See *Keshav Prasad v. A.D. Mani* [1961] DEC 133 (MPHC); *H.V. Kamath v. Election Tribunal* AIR 1958 MP 168).

It is further submitted by Mr.Thomas that paragraph 3(a) of the petition contains only a vague statement of the alleged grounds without stating the facts relied on to sustain the prayers. He says that under r. 25(13) proviso (b) the only person entitled to ask for recount is the next leading candidate and he can only ask for a recount where the difference between the number of votes cast for him is two per centum or less of the number of votes cast and as these facts have not been stated paragraph 3 (a) does not disclose any cause of action.

The contention of Counsel for the petitioner, Mr. Fong, is to the effect that as the law does not require the petitioner who relies on s. 32 (b) of the Act to specifically plead that section in a petition failure to mention the section by itself does not nullify the petition. He says that if the legislature intended that the exact section of the law must be stated, then it would have said so. There is no provision in r. 4(1)(b) and in the form provided under r. 4(4) requiring the petitioner to state specific section of the Act relied on. He urges the Court not to follow the decision in *Nobert Chong's* case because it is contrary to the fundamental rules of pleading that no law need to be pleaded. Counsel referred the Court to *James v. Smith* [1890] 1 QB 384 which held that "the statute of fraud must be pleaded if intended to be relied on as a defence; but it is not necessary to plead any particular section; and to *Onkar Nath v. Ram Sarup Varma* [1972] 44 ELR at 214 where it was held that:

> ... law is never pleaded in the plaint. So it is not necessary to say in the petition under which of the sections of the Representation of the People Act it fell ... so it is of no consequence if the petitioner does not specifically say under which of the two corrupt practices the present case falls.

On the question as to whether there is non-compliance with r. 4(1) (b) and 4(4) of the Rules, Mr. Fong's contention is that the rules are directory and not mandatory and they merely require the facts and grounds to be briefly stated as opposed to the Indian Legislation which requires them to be stated concisely. He says that the facts which are required by law or rules of pleading to be pleaded or stated have been so stated in the present petition and if there was any omission or insufficiency of material facts (not admitted) this alone does not nullify an election petition for the Court would not in an ordinary case strike out but give leave either to amend or order particulars. Further he says that even if the rules are mandatory, omissions or insufficiency of material facts cannot result in the petition which is otherwise valid being struck out on the grounds of insufficiency or vagueness of the facts. I think I should pause here and say a few words about the application of the High Court Rules and general rules of practice on pleading. It is clear I think from the provisions of s. 42 of the Act and from both Malaysian and Indian authorities that the High Court Rules and general rules of practice in civil cases only become relevant if there are no provisions in the Election Rules as contained in the Second Schedule to govern the matters in question. The Election Rules are special rules governing election petitions and shall prevail over the general rules if there is any conflict.

If it is otherwise clear from the petition which relief or reliefs set out in s. 32 of the Act are being relied upon by the petitioner I do not think failing merely to state the specific section of the law would have serious legal consequences. What is important is that it must be clear on the face of the petition what relief is being sought and the petition discloses a cause of action. It is well settled that failure to comply with the mandatory provisions of the Act or Rules would render the petition defective (see *Devan Nair's* case and *Muip bin Tabib's* case). As regards r. 4(1)(b) I am of the opinion that as the word 'shall' has been used throughout it is mandatory. The use of the word 'briefly' instead of the word 'concisely' as in the Indian legislation would not affect the mandatory nature of its provisions.

Regulation 25(13) of the Elections (Conduct of Elections) Regulations 1981, requires the returning officer (in this petition the 2nd respondent) to forthwith declare as having been elected the candidate to whom the greatest number of votes is given when counting of votes has been completed. There is no duty on him to order a recount except when circumstances set out in proviso (a) and proviso (b) exist and an application for recount has been made by any of the candidates or his agents under proviso (a) or by the next leading candidate under proviso (b). If no application for recount has been made I do not think anyone can allege that the returning officer has failed, neglected or refused to cause a recount to be made as he would then have no such duty to order a recount and would not be committing a breach of the regulation if no recount is made. The counting of votes is required to be made before the candidates, their election and counting agents. They have a right to apply for recount in the events mentioned in the provisos and if they wish to exercise such a right they must without delay apply to the returning officer. If the returning officer stops them from making such an application or refuses to consider their application it would provide them with a good ground for petitioning the Court for the relief under s. 32(b) of the Act. Since the application is to be made orally I cannot see how a candidate can be stopped from making such an application. Paragraph 3(a) of the petition is silent as to whether any of the circumstances mentioned in the provisos existed and as to whether the petitioner had made or attempted to make any application for a recount. In my judgment these are material facts required to be stated though briefly. Though I would not go as far as to say that the omission of a single material fact would render the petition defective, as the Supreme Court of India seemed to think in *Samant's case* (*Supra*), material facts sufficient to establish a cause of action must be stated. It is of vital importance that the petition must disclose a cause of action. Paragraph 3(a) as it stands contains only vague allegations without the facts relied on to support them. It does not disclose any cause of action and therefore ought to be struck out.

For reasons which I have given above the respondent succeeds on the motion and the petition is dismissed with cost. Money deposited by way of security may be applied towards payment of taxed cost.

Also found at [1984] 1 CLJ 51